

Mitigation Banking Factsheet

Compensating for Impacts to Wetlands and Streams

In November 1995, the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (Corps), U.S. Fish and Wildlife Service (FWS), National Oceanic and Atmospheric Administration's National Marine Fisheries Service, and U.S. Department of Agriculture's Natural Resources Conservation Service released [Federal Guidance on the Establishment, Use, and Operation of Mitigation Banks](#).¹ Although the concept of mitigation banking had been in existence for over a decade, the 1995 Banking Guidance was a milestone in institutionalizing the use of this emerging method of offsetting impacts to wetlands and other aquatic resources authorized under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The guidance gave state agencies, local governments, and the private sector the regulatory certainty and procedural framework they needed to move forward on seeking approval to operate mitigation banks. Following its issuance, banks proliferated across the country and became a mainstream compensatory mitigation option.²

What is a Mitigation Bank?

A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 or a similar state or local wetland regulation.³ A mitigation bank may be created when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency. The 1995 Banking Guidance established a structure for banking that is characterized by four distinct components:

- The bank site: the physical acreage restored, established, enhanced, or preserved;
- The bank instrument: the formal agreement between the bank owners and regulators establishing liability, performance standards, management and monitoring requirements, and the terms of bank credit approval;
- The Mitigation Bank Review Team (MBRT): the interagency team that provides regulatory review, approval, and oversight of the bank; and
- The service area: the geographic area in which permitted impacts can be compensated for at a given bank.

The value of a bank is defined in “compensatory mitigation credits.” A bank’s instrument identifies the number of credits available for sale and requires the use of ecological assessment techniques to certify that those credits provide the required ecological functions. Although most mitigation banks are designed to compensate only for impacts to various wetland types, within the past five years, banks have been developed to compensate specifically for impacts to streams (i.e., stream mitigation banks).

Mitigation banks are a form of “third-party” compensatory mitigation, in which the responsibility for compensatory mitigation implementation and success is assumed by a party other than the permittee. This transfer of liability has been a very attractive feature for Section 404 permit-holders, who would otherwise be responsible for the design, construction, monitoring, and ecological success of a compensatory mitigation site for a minimum of five years in addition to ensuring the site’s long-term protection.

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Background

Guidance from the FWS in 1983 supported the establishment of the first banks, most of which were sites

of advanced consolidated compensatory mitigation for impacts planned by state Departments of Transportation or other state agencies.⁴ The subsequent expansion of mitigation banking was catalyzed by the release of several important reports that challenged the effectiveness of compensatory mitigation practices under the Section 404 program, particularly on-site and single-project off-site compensatory mitigation.⁵ EPA and the Corps, the primary federal agencies responsible for implementing the federal Section 404 program, began to view banking as a way of addressing these shortcomings of mitigation policy and in response issued interim Banking Guidance in 1993 and final Banking Guidance in 1995. Mitigation banking programs were well-positioned to address many of these issues by providing for easier monitoring, long-term stewardship, and unambiguous transfer of liability for assuring mitigation success from the permittee to the banker. In addition, the promise of regulatory simplification for permit applicants that use a bank to satisfy permit conditions has also spurred activity in mitigation banking.

Language supporting the development of banking was included in the White House Office of Environmental Policy's 1993 Federal Wetlands Plan as well as in the Intermodal Surface Transportation Equity Act of 1993. With the passage of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, banking became the preferred compensatory mitigation alternative for impacts involving the federal funding of transportation projects.⁶ Since 1998, conferences have been held annually devoted to sharing and encouraging advances in mitigation banking policy and practice.⁷

Elevated interest in banking has spurred many Corps Districts to adopt regional guidance regulating banking, and to date approximately 15 of the 38 Districts have done so. Also, by 2001, 23 states had either statutes or regulations in place that authorized the use of mitigation banks and an additional eight states had issued guidelines to govern the use of mitigation banks.⁸

In response to comprehensive and independent critiques of the effectiveness of compensatory mitigation at offsetting impacts to wetlands and other aquatic resources under Section 404, EPA, the Corps, and the Departments of Agriculture, Commerce, Interior, and Transportation released the [National Wetlands Mitigation Action Plan](#) on December 26, 2002.⁹ The Plan includes 17 action items designed to improve the ecological performance and results of all forms of compensatory mitigation, including banking. Approximately half of these 17 action items have been implemented while the remaining items are currently under development.

In 2004, the [Society of Wetland Scientists](#) [EXIT Disclaimer](#) released a position paper describing mitigation banking as a sound mechanism which can improve compensatory mitigation success and contribute to the goal of no net loss of wetlands and other aquatic resources.¹⁰ Nevertheless, there continues to be a need to improve and refine the practices of site selection, design, implementation, monitoring, and long-term management for all compensatory mitigation projects, including mitigation banks.¹¹

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Status of Mitigation Banking

In 1992 there were only 46 banks permitted, almost all of which were publicly-sponsored single-user banks, in which entities such as state agencies or large corporations stockpile wetland credits for their own later use. The first entrepreneurial banks, selling credits to any permittee, were developed between 1991 and 1994. By the end of 2001, the Environmental Law Institute (ELI) had identified approximately 219 approved wetland mitigation banks nationwide, more than 130 of which were entrepreneurial banks, and 22 of which had sold out of credits. This represented a 376% increase in the number of banks over 10 years, nearly all of which occurred following the release of the 1995 Banking Guidance. ELI identified an additional 95 banks under review with approval pending as of December 2001. An estimated 139,000 acres were included in the 219 approved banks that provide a combination of wetland restoration, creation, enhancement, and/or preservation. The 95 banks under review at that time included an additional 8,000 acres. ELI also listed 40 approved "umbrella banks" (i.e., banks developing multiple compensation sites under a single instrument) with approximately 26,848 acres of mitigation wetlands approved at 308

individual sites.¹²

A 2005 inventory by the Corps' Institute for Water Resources estimates a total of 450 approved mitigation banks (59 of which have sold out of credits) and an additional 198 banks in the proposal stage. Since this survey counted umbrella banks as a single bank, the number of bank sites is considerably larger than this estimate.

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Benefits of Mitigation Banking

Mitigation banking has a number of advantages over traditional permittee-responsible compensatory mitigation because of the ability of mitigation banking programs to:

- Reduce uncertainty over whether the compensatory mitigation will be successful in offsetting project impacts;
- Assemble and apply extensive financial resources, planning, and scientific expertise not always available to many permittee-responsible compensatory mitigation proposals;
- Reduce permit processing times and provide more cost-effective compensatory mitigation opportunities; and
- Enable the efficient use of limited agency resources in the review and compliance monitoring of compensatory mitigation projects because of consolidation.

In its 2001 critique of compensatory mitigation, the [National Research Council \(NRC\)](#) EXIT Disclaimer concluded that third-party compensatory mitigation such as mitigation banks offer advantages over permittee-responsible mitigation in the fulfillment of regulatory goals.¹³ One such advantage identified by NRC is the consensus-driven interagency MBRT review process used to approve banks.¹⁴ The 2002 National Mitigation Action Plan acknowledges that more expertise and collaboration should be brought to bear on the Section 404 mitigation process; banks overseen by effective MBRTs have proven to offer the most effective institutional structure at achieving this objective. The NRC also noted that banks are more likely than traditional compensatory mitigation to achieve desired long-term outcomes and to create mitigation sites that are protected in perpetuity by organizations dedicated to resource conservation.¹⁵

Additionally, banking represents an increasingly important economic component of the environmental consulting sector, showcasing the synergies that can arise between effective environmental protection and economic expansion. Sixty two percent of the banks identified in ELI's 2002 study were privately-owned entrepreneurial mitigation banks; entrepreneurial providers of bank credits have emerged as a nationally-organized industry¹⁶ contributing hundreds of millions of dollars annually to the domestic product.

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Looking Ahead

EPA looks forward to working with the Corps and our other partners on continuing to improve mitigation banking's effectiveness at offsetting authorized impacts to wetlands, streams, and other aquatic resources. Improving MBRT training, expanding mitigation bank tracking and monitoring, and clarifying the roles and responsibilities of the long-term stewards of compensatory mitigation project sites are a few of the areas the EPA plans to focus on in the coming years.

Related Links

Federal Guidance for the Establishment, Use and Operation of Mitigation Banks

www.epa.gov/owow/wetlands/guidance/mitbankn.html

EPA mitigation website

www.epa.gov/wetlandsmitigation/

Corps Regulatory Program website

www.usace.army.mil/cw/cecwo/reg/

National Mitigation Action Plan

www.mitigationactionplan.gov

2001 National Research Council Compensatory Mitigation Study

www.nap.edu/books/0309074320/html/ EXIT Disclaimer

Environmental Law Institute Banks and Fees website

www2.eli.org/wmb/index.htm EXIT Disclaimer

Society of Wetland Scientists' Mitigation Banking Position Paper

www.sws.org/wetland_concerns/banking.mgi EXIT Disclaimer

National Mitigation Banking Association

www.mitigationbanking.org/ EXIT Disclaimer

National Mitigation and Conservation Banking Conference

www.mitigationbankingconference.com/ EXIT Disclaimer

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References

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3. Compensatory Mitigation Fact Sheet, www.epa.gov/owow/wetlands/pdf/CMitigation.pdf
4. U.S. Fish and Wildlife Service. 1983. U.S. Fish and Wildlife Service Interim Guidance on Mitigation Banking. ES Instruction Memorandum No. 80, June 23, 1983.
5. Eliot, Wendy. 1985. *Implementing Mitigation Policies in San Francisco Bay: A Critique*. Oakland, CA: California State Coastal Conservancy; Race, Margaret Seluk. 1985. Critique of Present Wetlands Mitigation Policies in the United States Based on an Analysis of Past Restoration Projects in San Francisco Bay. *Environmental Management* 9 (1):71-82; Erwin, Kevin L. 1990. Wetland Evaluation for Restoration and Creation. In *Wetland Creation and Restoration: The Status of the Science*, edited by J. A. Kusler and M. E. Kentula. Washington, DC: Island Press.
6. TEA-21 Banking Preference Guidance, www.epa.gov/owow/wetlands/pdf/TEA-21Guidance.pdf
7. National Mitigation and Conservation Banking Conference, www.mitigationbankingconference.com/ EXIT Disclaimer
8. ELI, 2002.
9. National Mitigation Action Plan, www.mitigationactionplan.gov/
10. Society of Wetlands Scientists, www.sws.org/wetland_concerns/banking.mgi EXIT Disclaimer
11. National Research Council, 2001. "Compensating for Wetland Losses Under the Clean Water Act," National Academy Press, Washington, D.C., www.nap.edu/books/0309074320/html/ EXIT Disclaimer
12. ELI, 2002.
13. NRC, 2001, p. 9.

14. NRC, 2001, pp. 82, 160-4.
15. NRC, 2001, p. 163.
16. National Mitigation Banking Association, www.mitigationbanking.org/ EXIT Disclaimer

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URL: <http://www.epa.gov/owow/wetlands/facts/fact16.html>